No. 15,142

In the

United States Court of Appeals

For the Ninth Circuit

LEETA A. LLOYD,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY, a corporation,

Appellee.

Appellee's Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Appellee (defendant below) does not controvert the Jurisdictional Statement of appellant (plaintiff below) in Appellant's Opening Brief, pp. 1-2.

STATEMENT OF THE CASE

Warren William Lloyd applied to appellee through its agent, Jack O'Neil, on December 6, 1952, to issue him a policy of life insurance, making the special request in writing in item 25 of his application as follows:

"Use this space for special requests.
Date Policy Jan. 1, 1953."

(Tr. pp. 46 (item 25), 70). Mr. Lloyd signed the application (Tr. pp. 48, 59-60 (item 3)). Appellant has conceded in the hearing below that Mr. Lloyd requested that the policy be dated January 1, 1953 (Tr. p. 97). The application was sent to appellee's home office and policy No. 1127042 was executed there pursuant to the application on January 5, 1953 (Tr. pp. 64, 76 (box marked "ISSUED")). January 5, 1953, is the date of the testimonium clauses of the policy (Tr. pp. 9, 34). The policy was made effective as of January 1, 1953, in accordance with the special request in the application (Tr. p. 64). The outside cover and the first page of the policy clearly state "First Policy Year Begins: January 1, 1953." (Tr. pp. 8, 48). This policy was delivered to Mr. Lloyd by Mr. O'Neil and Mr. Lloyd accepted it in January, 1953, (Tr. pp. 69, 96).

The policy provides:

> "Suicide: If within two years from date of issue the Insured (whether sane or insane) shall die by self-destruction, the liability of the Company shall be restricted to the amount of premiums paid hereon." (Tr. p. 11)

The insured admittedly died by self-destruction on December 21, 1954 (Tr. p. 60 (item 6)). Appellee contends that the insured died by self-destruction within two years from the date of issue, January 1, 1953, which he himself specially requested, and that appellee's liability on the policy is therefore restricted by the terms of the suicide clause to the amount of the premiums paid. The premiums paid were eight *quarterly* premiums of $36.04, a total of $288.32 (Tr. pp. 74-76). Appellee has offered to pay this amount to appellant (Tr. pp. 4 (para. VI), 54) and appellant has rejected the offer (Tr. pp. 4-5 (para. VI)).

At the time of the application Mr. Lloyd gave Mr. O'Neil a note for $12.57 to cover one monthly premium. When the

policy was delivered to him, Mr. Lloyd decided to pay premiums quarterly instead of monthly and therefore gave Mr. O'Neil his check for $36.04 to cover the first quarterly premium from January 1, 1953, to March 31, 1953. His note for $12.57 was returned or destroyed. No payment was ever made upon it (Tr. p. 69). At no time did the applicant request short term or temporary insurance pending the issuance of his policy effective January 1, 1953 (Tr. p. 70). There is no evidence in the record to contradict this account of the transaction by Mr. O'Neil. Mr. Lloyd paid only the eight quarterly premiums for the two years 1953 and 1954 (Tr. pp. 74-76).

The receipt attached to the application for the policy was not in fact given to the applicant at the time of the application but was left attached to the application and was still attached to the application when the application was received by appellee at its home office (Tr. p. 64). That receipt was not required by appellee to be given to the applicant, as appellant states, nor did the applicant have a right to the receipt attached to the application in view of his request to postdate the policy. Appellee has conceded below for the purpose of *its* motion for summary judgment *only* "* * * that a receipt on a form prepared by defendant was given to the insured." (Tr. p. 67). The receipt form provides that "* * * the insurance shall be effective in accordance with the provisions of the policy applied for * * *" (Tr. p. 66). The provisions of the policy applied for include the special request in the application to date the policy January 1, 1953, which is part of the contract between the parties (Tr. p. 14).

The present appeal is taken from the Judgment of Judge Edward P. Murphy on February 27, 1956, on defendant's (appellee's) motion for summary judgment and plaintiff's

(appellant's) countermotion for summary judgment (Tr. pp. 78, 83, 85). The Judgment decreed that there is no genuine issue as to any material fact, that defendant is entitled to judgment as a matter of law, that the action be dismissed on the merits and that defendant recover its costs. (Tr. p. 78).

QUESTION INVOLVED

Was the death of the insured by self-destruction on December 21, 1954, within two years from the "date of issue" of the policy referred to in the suicide clause, thus restricting appellee's liability on the policy to the amount of premiums paid?

ARGUMENT

I. January 1, 1953, Was the Date of Issue Referred to in the Suicide Clause.

Appellee's liability on the policy is restricted to the amount of premiums paid if the death of the insured by self-destruction on December 21, 1954, was within two years from the date of issue of the policy within the meaning of the suicide clause. That date of issue was January 1, 1953. The death of the insured was within two years thereafter and the liability of the appellee is thus restricted to the amount of premiums paid.

There is no dispute about the fact that the insured made the special request to date the policy January 1, 1953. That fact appears from the application (Tr. p. 46 (item 25)), which he admittedly signed (Tr. pp. 48, 59-60 (item 3)), and it was conceded by counsel for appellant in the opening statement in the hearing below (Tr. p. 97). The application was an application to appellee to issue the applicant a policy. The request in the application was directed to the issu-

ance of the policy. The request "Date Policy Jan. 1, 1953" was therefore in common sense and ordinary understanding a request that that date be made the date of issue.

The policy was actually issued or executed, that is, typed and signed, on January 5, 1953, but it was made effective as of January 1, 1953, in accordance with the special request of the applicant (Tr. pp. 64, 70). That date is the effective date stated in the policy itself, which was delivered to and accepted by the applicant (Tr. p. 69), providing both on the outside cover and on the first page that: "First Policy Year Begins: January 1, 1953". (Tr. pp. 8, 48). The date of the policy year or anniversary date is the paramount date of the policy and is used for determining the dates for the main features of the insurance, such as: payment of premiums (Tr. pp. 9, 27, 30, 33), grace period (Tr. p. 10), determination of age (Tr. pp. 8, 28), loan value (Tr. p. 15), reserve basis (Tr. pp. 16-17), dividends (Tr. p. 17), extended insurance (Tr. p. 20), paid-up insurance (Tr. p. 20), cash surrender value (Tr. p. 21), application of non-forfeiture and loan value tables (Tr. pp. 22-3), mortgage redemption provisions (Tr. pp. 31-32). It is also the basis upon which premiums actually were paid (Tr. pp. 74-76).

This Court has held that the request of an applicant to date a policy of life insurance as of a certain date fixes the "date of issue" for purposes of the incontestability clause, *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295, 298-300 (9th Cir. 1935). The policy in that case provided that it should be incontestable after two years from its "date of issue". The applicant had instructed the insurer in his application to "Date Policy as of Sep. 29, 1930." This Court held, relying upon the decision of the Supreme Court of the United States in *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U.S. 167, 44 Sup. Ct. 90 (1923), that the "date of issue"

was the date of the testimonium clause, but that the effect of the request in the application to date the policy as of September 29, 1930, made that date the effective date of the testimonium clause and thus the date of issue. The *Mutual Life* and *Horwitz* cases involved incontestability clauses and not a suicide clause, but their reasoning is controlling in the instant case. The language of the request in the *Mutual Life* case, "Date Policy August 23, 1915;" and in the *Horwitz* case, "Date Policy as of Sep. 29, 1930," and the language of the request in this case, "Date Policy Jan. 1, 1953" are to the same effect. The applicant made his request in the item marked "Use this space for special requests." (Tr. p. 46). January 1, 1953, is therefore the date of issue of the policy. The request of the applicant "* * * would have no effect whatsoever unless given this interpretation, * * * regardless of the rule of construction favoring the insured." *Horwitz v. New York Life Ins. Co.,* 80 F.2d 295, 299 (9th Cir. 1935). The parties were competent to choose the date on which the policy was to go into effect. See *Schwartz v. Northern Life Ins. Co.,* 25 F.2d 555 (9th Cir. 1928), reh. den. (1928), cert. den., 278 U.S. 628 (1928); *Anderson v. Mutual Life Ins. Co.,* 164 Cal. 712; 130 Pac. 726 (1913).

Counsel for appellant have argued that the reasonable construction of the request by the insured that the policy be dated January 1, 1953, is that "* * * he wanted time to decide whether he would start the regular premium paying period on a monthly, quarterly, semi-annual or annual basis." (Op. Br., p. 10). Such a construction is not reasonable. It is at best a strained attempt to find an alternative for the obvious meaning of the request of the applicant that the policy was to go into effect on the first of the year then just about to start.

II. There Was No Short-Term or Interim Insurance.

There was no short-term or interim insurance in this case. The insured did not apply for such insurance in his application (Tr. pp. 40 (item 5), 48), and it is the uncontradicted testimony of the agent, Mr. O'Neil, that the applicant at no time made a request for short-term or temporary insurance pending the issuance of his policy, which was to be effective January 1, 1953 (Tr. p. 70). The procedure for such insurance was not followed (Tr. pp. 70, 71-3). No premium for the short-term insurance accompanied the application as required for short-term insurance (Tr. p. 72). There was no actual payment for such insurance. The applicant's note of $12.57 for the first month's premium on the policy to start January 1, 1953, was given to cover the month of January, 1953, when the applicant requested the policy to start. The applicant's request and the policy itself made January 1, 1953, the beginning of the first policy year. That date is when the first premium is payable. The "Consideration" clause which appellant quotes in part (Op. Br. p. 4), provides in full:

> "Consideration: This insurance is granted in consideration of the application herefor and of the payment in advance of the premiums as herein provided. *The first premium in the amount specified on the first page, is payable at the beginning of the first policy year* and subsequent premiums are payable on the anniversary of said date in every year thereafter until premiums have been paid for the period specified on the first page." (Tr. pp. 9-10). (Emphasis added.)

Furthermore, no payment was ever made on the note (Tr. p. 69). When the applicant received his policy and changed his method of paying premiums to the quarterly basis, this note was returned to him or destroyed and was superseded by his check for $36.04 to cover the period from January 1,

1953, to March 31, 1953. The insured paid only eight quarterly premiums of $36.04 each, or a total of $288.32, to cover the policy years 1953 and 1954 (Tr. pp. 74-76).

Appellant seeks to find interim coverage on the basis of the receipt. Appellee conceded below, *only* for the purpose of *its* motion, that a receipt on a form prepared by the appellee was given to the insured at the time of the application (Tr. p. 67). The giving of a receipt does not create interim coverage between the time of application and the time of issuance of the policy where the applicant has made a special request to postdate the policy. The special request was one of the terms of the application and of the policy issued pursuant thereto and of the receipt. The receipt does not vary the terms of the insurance applied for but expressly provides that it is subject to them. The receipt states that "* * * the insurance shall be effective in accordance with the provisions of the policy applied for * * *". One of those provisions was the special request to postdate the policy, which was one of the terms of the contract between the parties (Tr. p. 14). The application in *Horwitz v. New York Life Ins. Co.,* 80 F.2d 295, 299 (9th Cir. 1935), contained substantially similar language, and this Court there held that such language made the requested date the "date of issue" as part of the contract between the parties.

The statutes and cases cited by appellant do not support the theory of interim insurance. Section 484 of the California Insurance Code* provides only that an acknowledgment of receipt of premium is conclusive evidence of payment so far as to make the policy binding, notwithstanding any stipulation in the receipt to the contrary. It does not alter

*Appellant has referred to section 384 (Op. Br. p. 6) but presumably means section 484. The section is set out in the Appendix below.

the provisions of the policy applied for or the effect of the applicant's special request. Section 382† of the California Insurance Code providing for the issue of covering notes is not relevant to the question before the Court. Appellee does not contend that such notes may not be issued. It contends that no such note ever was issued for interim coverage from December 11, 1952. The receipt conceded to have been given could hardly be a covering note for coverage from December 11, 1952, when it was a receipt for, and was subject to, an application wherein the applicant himself requested later coverage. None of the cases cited by appellant involves a request to postdate the policy, which is the nub of this case.

III. The Law Does Not Require Insurance Coverage from Date of Medical Examination When the Applicant Requests That His Policy Begin at a Later Date.

Appellant argues that the law requires insurance coverage from the date of medical examination and that the request to postdate the policy is compatible with prior coverage or is at any rate an ambiguity which should be resolved, according to well-established principles, in favor of the insured. It is not reasonable to suppose that the applicant's request to postdate the policy January 1, 1953, meant anything other than that he wanted the policy to start at the beginning of the year. There is no ambiguity about it, and the rule of construction favoring the insured cannot change it. *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295, 299 (9th Cir. 1935). Section 10115* of the California Insurance Code, relied upon by appellant in the Statement of Points (Tr. p. 104 (item 12)), but not referred to in Appellant's Opening

†See Appendix below.

*See Appendix below.

Brief, foresees and provides for such a request. That section provides for coverage of the insured under certain conditions if he should die after application and payment of premium and approval of the policy by the insured but before the policy is actually issued. The section states that the insurer is liable when "* * * the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, *whichever is later* * * *". (Emphasis added.) Thus the statute clearly intends that a policy is not to go into effect before the date specially requested by the insured. If Mr. Lloyd had died after his application but before January 1, 1953, appellee would not have been liable, since coverage did not start until that date. The two year period of the suicide clause could not have started to run before that date.

Appellant's suggestion that the request to postdate the policy be construed as a condition subsequent would make the request meaningless. *Ransom v. Penn Mutual Life Ins. Co.*, 43 C.2d 420; 274 P.2d 633 (1954) reh. den. (1954), cited as authority for this proposition, surely did not hold this, for it did not involve a request to postdate, nor did any of the other cases cited by appellant.

Appellant argues that if the special request to date the policy January 1, 1953, is to be given effect, then the insured, in giving the agent a promissory note on December 6, 1952, for a monthly premium, was parting with a consideration and receiving nothing in return. But the obvious effect of the note, taken together with the special request to date the policy January 1, 1953, was to make the policy effective from that date, regardless of when it was in fact issued or delivered. Actually the policy was not issued until January

5, 1953, and it was not delivered until some time later than that, but it was effective from January 1, 1953, by virtue of the special request and the promissory note for the first month's premium. The consideration for the note was the coverage which the applicant received from the effective date of the policy. When the policy was delivered by the agent to the insured, the latter decided to pay the premiums quarterly and gave a check for the first quarterly premium for the quarter commencing January 1, 1953. The agent, who had personally retained the note, then returned it to the insured or destroyed it. All subsequent premiums (Tr. p. 76), including one paid by the beneficiary (Tr. p. 58), were paid on a quarterly basis measured from January 1, 1953.

Upon these undisputed facts, it is idle to argue that the promissory note given to the agent on December 6, 1952, was intended to pay a monthly premium for one month ending January 6, 1953, or January 11, 1953 (being one month after the medical examination). The insured never paid the promissory note, and the only premiums ever paid were quarterly for the period commencing January 1, 1953. Appellant's argument is surely without merit in the light of the fact that only eight quarterly premiums were paid on the basis of the policy date which was expressly requested by the applicant. Under these circumstances, if the policy were deemed effective from December 11, 1952, the insured received 20 days of insurance protection for which he never paid.

CONCLUSION

There is no genuine issue as to any material fact; both parties moved for summary judgment in the court below. Appellee is entitled to judgment as a matter of law, and the action was rightly dismissed on the merits with costs to the defendant. The judgment below should be affirmed with costs of appeal to appellee.

Respectfully submitted,

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(Appendix Follows)

Appendix

Insurance Code of the State of California:

"§ 382. *Covering notes: Time for issuance of policy: Extension or renewal of covering notes.*

[*Issuance of covering notes: Time for issuance of policy: Terms.*] Covering notes may be issued to bind insurance temporarily pending the issuance of the policy. Within 90 days after issue of a covering note a policy shall be issued in lieu thereof, including within its terms the identical insurance bound under the covering note and premium therefor.

"[*Extension or renewal of covering notes: Rules and regulations.*] Covering notes may be extended or renewed beyond such 90 days with the written approval of the commissioner if the commissioner determines that such extension is not contrary to and is not for the purpose of violating any provision of this code. The commissioner may promulgate rules and regulations governing such extensions for the purpose of preventing such violations and may by such rules and regulations dispense with the requirement of written approval by him in the case of extensions in compliance with such rules and regulations."

"§ 484. *Acknowledgment of receipt of premium in policy as conclusive evidence of payment.* An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid."

"§ 10115. *Binders; death of insured before issuance of policy.* When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the applicant and either (1) the applicant received at that time a receipt for said payment on a form prepared by the insurer, or (2) in the absence of such a receipt the

insurer receives the said payment at its home office, branch office, or the office of one of its general agencies, and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant. The provisions of this section shall not prohibit an insurer from limiting the maximum amount for which it may be liable prior to actual issuance and delivery of the policy of life insurance either to (1) an amount not less than its established maximum retention, or to (2) fifty thousand dollars ($50,000), if a statement to this effect is included in the application."